

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RSA No. 95/2014 & CM NO. 6100/2014

% **2nd April, 2014**

HAJI ABDUL MATEEN (DECD.) THROUGH HIS LRS

.....Appellants.

Through: Mr. Manu Nayar, Mr. V.P.Dewan and
Mr. Sanjay Dewan, Advocates.

VERSUS

SHEIKH HAJI FIROZUDDIN & ORS.

..... Respondents.

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J (ORAL)

1. This second appeal is filed under Section 100 CPC impugning the concurrent judgments of the courts below ; of the executing court dated 15.3.2013 and of the first appellate court dated 1.2.2014, by which the objections filed by the appellants, who were transferees pendente lite have been dismissed and the decree-holder has been permitted to execute the judgment and decree dated 6.4.2011. I may note that the judgment and decree dated 6.4.2011 is a decree passed by a first appellate court inasmuch as, the trial court had dismissed the suit of the plaintiff, but in appeal, the

judgment of the trial court dated 31.5.2008 was set aside and the first appellate court decreed the suit for possession and mesne profits vide judgment dated 6.4.2011.

2. The suit property is of an area of 57 ½ sq. yds shown in the site plan Ex.PW1/1 in K.No. 319, Village, Maujpur, Illaqa Shahdara, Delhi and with respect to which, the decree and judgment was passed in favour of the plaintiff/decreed-holder (respondents) on 6.4.2011.

3. Both the courts below have held that the appellants/objectors who are transferees pendente lite have no protection in view of Section 52 of the Transfer of Property Act, 1882 which provides for the doctrine of lis pendens and that transfer of a suit property pendente lite/lis pendens will be void as against a successful plaintiff.

4. A chain of title deeds by which the rights in the suit property were transferred during the pendency of the suit, which was filed in the year 1982, is stated in para 2 of the judgment of the executing court/first court and which para 2 reads as under:-

“2. The case of the objectors is that they all are L.Rs of Late Hazi Abdul Matin (herein after referred to as the ‘deceased’). The deceased had become the absolute owner of the property in question. The objectors have filed the documents through

which the deceased allegedly became the owner which are as follows:-

1. GPA, Agreement to Sell, affidavit, receipt and Will dated 13/01/1999 executed by Ajmeri Khan in favour of Arshad Hasan for 25 sq. yds.
2. GPA, agreement to sell, receipt, SPA dated 24/02/1997 by Sh. Anees Ahmed son of Zahoor Ahmed (Zahoor Ahmed is JD no.3 in favour of Sh. Ajmeri Khan wrt 25 sq. yds.
3. GPA, Will agreement to sell, receipt dated 26/12/1995 executed by Zahoor Ahmed/JD no.3 in favour of his own son i.e. Anees Ahmed.
4. Two GPAs dated 25/06/1994 executed by Mohd. Shafi and Mohd. Salahudin in favour of Zahoor Ahmed/JD no.3 respectively for **30 sq. yds.** and **25 sq. yds.**
5. Will, agreement to sell, receipt dated 16/12/1995 executed by JD no.3 in favour of his own son Anees Ahmed wrt **25 sq. yds.**
6. GPA, Will, receipt, possession letter, agreement to sell and affidavit, all dated 05/07/2003 executed by Arshad Hasan in favour of his own wife Dr. Seema Khatoon wrt plots of **25 sq. yds.** and **30 sq. yds.**
7. Sale deed dated 17/01/2006 executed by Ms. Seema Khatoon wife of Arshad Hasan in favour of deceased with respect to **55 sq. yds.”**

5. Section 52 of the Transfer of Property Act reads as under:-

“52. Transfer of property pending suit relating thereto During the pendency in any court having authority 3[4[within the limits of India excluding the State of Jammu and Kashmir] Government or established beyond such limits] by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order

which may be made therein, except under the authority of the court and on such terms as it may impose.”

6. A reading of the aforesaid section shows that any transfer of property pendente lite is void as against the plaintiff who gets a decree in his favour in the suit. Unlike some other provisions in the Transfer of Property Act, 1882 and the Specific Relief Act, 1963 wherein there is an exception carved out with respect to a bonafide purchaser for value, with respect to transferee pendente lite, no exception is carved out and Section 52 is therefore an absolute bar against pendente lite transfer of a suit property which can defeat the right of a successful plaintiff. I may note that the executing court/first court has relied upon the provision of Order 21 Rule 102 CPC to hold that the objections cannot be filed by transferees pendente lite, and which provision of Order 21 Rule 102 reads as under:-

“ Order 21 Rule 102.

Rules not applicable to transferee *pendente lite*.-

Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation.-In this rule, “transfer” includes a transfer by operation of law.”

7(i) The conclusion of the first court/executing court that the objections filed by the appellants are barred under Order 21 Rule 102 CPC is supported by the judgment of the Supreme Court in the case of ***Usha Sinha Vs. Dina Ram & Ors. (2008) 7 SCC 144*** which holds that the doctrine of lis pendens would cover transfer of a property during the pendency of the suit and objections filed by such transferees would be barred in view of Order 21 Rule 102 CPC.

(ii) In view of the above, it is clear that appellants being transferees pendente lite, would not be entitled to claim rights in the suit property by claiming to be bonafide purchasers for value without notice, because, there is an absolute bar to transfer of a suit property pendente lite by virtue of Section 52 of the Transfer of Property Act, 1882.

8. Learned counsel for the appellants sought to place reliance upon two judgments of this Court reported as ***Mohd. Farjam Vs. Sarfaraz Ahmed & Ors. 191(2012) DLT 247 (DB)*** and ***Shri Manoj Kr. Shah Vs. Shri Anand Kr. And Anr. (2007) 97 DRJ 189*** in support of the proposition that once objections are filed, then, the provisions of Order 21 Rule 97 onwards till Rule 106 come into force and such objections filed by the appellants could not have been dismissed by courts below without giving

opportunity to the appellants to lead evidence. What is essentially argued is that issues had to be framed, evidence had to be led by both the parties and only thereafter objections could have been dismissed and till when the appellants can continue in possession of the suit property.

9. In my opinion, the judgments which are relied upon have no application to the facts of the present case because these judgments do not pertain to rights claimed by transferees pendente lite, and therefore the observations in two cases relied upon have to be read with respect to those objectors who claimed rights in the property with respect to which a decree has been passed but the rights claimed by such persons are independent of the rights of the parties in the suit or persons who claim rights through the parties to the suit. Since the appellants are transferees pendente lite, they claim through the defendants in the suit, and therefore, are claiming through the parties in the suit, and consequently, they are as much bound by the judgment and decree like the original parties by virtue of Section 11 CPC which says that judgment and decree not only binds the parties to the suit but also all persons who claim through such parties.

10. Learned counsel for the appellants also then sought to argue that the appellants ought to have been impleaded as parties to the suit under

Order 22 Rule 10 CPC and under Order 1 Rule 10 CPC and since that was not done they are entitled to be heard before execution. Reliance in support of this argument is placed upon the observations of the Supreme Court in the case of *Khemchand Shankar Choudhari Vs. Vishnu Hari Patil and Ors.* (1983) 1 SCC 18, and which read as under:-

“6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognizes the right of the transferee to be impleaded as a party to the proceedings to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. An heir of a legatee or an official receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out.”

11. The observations of the Supreme Court relied upon by the appellant in the case of *Khemchand Shankar (supra)* in fact goes against

the appellants because it is not as if the appellants had made application for being impleaded as a party under Order 22 Rule 10 CPC in the suit but that application was declined. Of course, if a transferee pentente lite seeks to get impleaded, courts ordinarily allow such impleadment, whether under Order 1 Rule 10 CPC or under Order 22 Rule 10 CPC, but merely because a person did not know of pendency of a suit, and therefore did not or could not seek to be impleaded, cannot mean that the bar of Section 52 of the Transfer of Property Act will not operate.

12. In fact, Supreme Court in the case of *Dhurandhar Prasad Singh vs. Jai Prakash University & Ors., 2001 (6) SCC 534* has held that the provision of Order 22 Rule 10 CPC unlike the Order 22 Rules 3 and 4 is not mandatory i.e. whereas in case of a death of a plaintiff or defendant applications have to be filed to bring on record the legal representatives of the deceased plaintiff or defendant, however, when there is devolution of interest in the property during the pendency of the suit, Order 22 Rule 10 CPC applies and for which, neither any limitation is provided nor it is mandatory to move an application under Order 22 Rule 10 CPC inasmuch as, the suit continues even if devolution of interest /transfer of interest takes place from the original parties to the suit, and the judgment and decree

passed in such a suit will operate against the original parties and persons who claim through them ie the transferees on whom interest in the suit property devolves pendente lite.

13. I therefore reject the argument urged on behalf of the appellants that since they were not impleaded as parties in the suit, the decree is not binding upon them, and that consequently their objections have to be considered on merits by allowing them to lead evidence. I must at this stage itself state that I fail to understand as to what would be the evidence which could be led in the objections inasmuch as the admitted position which emerges is that appellants were transferees pendente lite and once that is so they cannot claim any rights by virtue of bar of Section 52 of the Transfer of Property Act, 1882 because the decree passed in the suit binds them as the decree binds the original parties to the suit by virtue of Section 11 CPC. Whatever doubt remains with respect to the judgment and decree being res judicata against them, is removed by provision of Order 21 Rule 102 CPC which is quoted by the trial court and which is also reproduced by me to be read with judgment of the Supreme Court in the case of *Usha Sinha (supra)* which holds that transferees pendente lite cannot use the provision

pertaining to filing of objections under Order 21 Rules 97, 99 etc against the judgment and decree.

14. Though learned counsel for the appellant sought to place reliance upon ***Thomson Press (India) Ltd. Vs. Nanak Builders & Investors P. Ltd. & Ors. (2013) 5 SCC 397*** , however, this judgment does not lay down any principle that transferee pendente lite can claim rights in the suit property merely on the ground that he is a bonafide purchaser for value without notice. In fact, on repeated queries, counsel for the appellants could not point out any para in this judgment which holds that bar under Section 52 of the Transfer of Property Act is not absolute and that there is an exception in favour of a pendente lite bonafide purchaser for value without notice. The judgment in the case of ***Thomson Press (India) Ltd (supra)*** is in fact basically on the proposition that a transfer pendente lite is not void but it is subject to a final decision in the suit, and which observations were made for clarifying the observations of the Supreme Court in the case of ***Surjit Singh and Others Vs. Harbans Singh and Others (1995) 6 SCC 50.*** In the case of ***Surjit Singh (supra)***, it was held that if property is transferred in violation of the injunction order during the pendency of the suit, the transfer is void, and this aspect has been clarified by the judgment of the

Supreme Court in the case of *Thomson Press (India) Ltd (supra)* that transfer is not void but the transfer is subject to a final decision in the suit. Similar observations have also been made by referring to other judgments of the Supreme Court, in the case of *Thomson Press (India) Ltd (supra)*.

15. Learned counsel for the appellant finally relied upon the judgment of the Supreme Court in the case of *Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. & Ors. AIR 2008 SC 225* to argue the proposition that appellants can take recourse to Order 21 Rules 97 and 99 etc once they are not parties to the suit, however, once again this judgment does not apply because the issue is not that the decree is not binding against persons who are not parties to the suit but the issue is that it is binding against persons who claim parties to the suit and which aspect is fully covered against the appellant by Order 21 Rule 102 CPC. Of course any decree in a suit is only binding between the parties to the suit and not on third persons, but, the expression ‘parties to the suit’ includes persons who claim through the parties to the suit.

16. Learned counsel for the appellant also argued for considerations of the objections by the executing court by placing reliance upon Order 21 Rules 15, 58 and other provisions, but once again these are provisions which

are not applicable where objections are filed by persons who claim through the parties to the suit and in which case the provisions of Section 52 of the Transfer of Property Act and Order 21 Rule 102 CPC apply.

17. In view of the above, no substantial question of law arises under Section 100 CPC, and accordingly, the appeal is therefore dismissed, leaving the parties to bear their own costs.

APRIL 02, 2014
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VALMIKI J. MEHTA, J.